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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

PORT TERMINAL RAILROAD ASSOCIATION,
Petitioner

v.

ROY W. SIMS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

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QUESTION PRESENTED

May a state court contravene the Railway Labor Act, the Federal Employers' Liability Act, and decisions of this Court and other federal courts pertinent to those acts and award damages in a cause of action under the Federal Employers' Liability Act based on the state's common law?

LIST OF PARTIES

Petitioner — Port Terminal Railroad Association.[1]

Respondent — Roy W. Sims.

1. The Port Terminal Railroad Association is an association of railroads composed of the Missouri-Kansas-Texas Railroad Company of Texas, a corporation; Southern Pacific Transportation Company, a corporation; Burlington Northern Railway Company, a corporation; Houston Belt & Terminal Railway Company, a corporation; Missouri Pacific Railroad Company, a corporation; and the Atchison, Topeka & Santa Fe Railway Company, a corporation.

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OPINION BELOW

The opinion of the Court of Appeals for the First Supreme Judicial District of Texas, rendered on March 22, 1984, is reported at 671 S.W.2d 575.

JURISDICTION

The judgment of the Court of Appeals for the First Supreme Judicial District of Texas was entered on March 22, 1984. The Court of Appeals denied Petitioner's Motion for Rehearing on May 17, 1984. The Supreme Court of Texas "refused, no reversible error," Petitioner's Application for Writ of Error on October 10, 1984, and overruled Petitioner's Motion for Rehearing on November 14, 1984, making final the decision of the Court of Appeals.

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1257(3), because a right specifically set up and claimed under a statute of the United States is involved herein.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are:

(1) the Federal Employers' Liability Act, 45 U.S.C.A. § 51, *et seq.*, which provides in pertinent part as follows:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency,

due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

(2) the Railway Labor Act, 45 U.S.C.A. § 151, *et seq.*, which provides in § 153 First (i):

The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the adjustment board with a full statement of the facts and all supporting data bearing upon the disputes.

STATEMENT OF THE CASE

This suit was brought by Roy W. Sims, hereinafter "Respondent," under the Federal Employers' Liability Act, 45 U.S.C.A. § 51, *et seq.* ("FELA"), to recover damages from the Port Terminal Railroad Association, hereinafter "Petitioner," for personal injuries which he claims to have sustained on April 30, 1981. The alleged accident occurred between 8:00 and 8:30 p.m., during Respondent's regular tour of duty. After the occurrence allegedly resulting in his injury, Respondent completed his regular tour of duty, working until approximately 10:30 p.m., did not request a replacement, and did not file an accident report, although he was required to do so by his rules of employment. The following day, May 1, 1981, Respondent reported to work at his usual time,

2:30 p.m. Still, no report of his alleged injury was made to any officer or representative of Petitioner. At approximately 8:10 p.m. that evening, Respondent was removed from service as a result of insubordination in an incident involving Respondent's trainmaster and yardmaster. At that time, no representative of Petitioner had received any notice that Respondent claimed to have sustained an injury. An accident report was not filed by Respondent until three weeks after his removal from service, on May 18, 1981.

The collective bargaining agreement between Petitioner and Respondent's union, the United Transportation Union —Engineers, sets forth the procedure for appealing discharges such as Respondent's. In accordance with Article 13 of the collective bargaining agreement, an investigation into the incident involving Respondent was held on June 29, 1981, which resulted in Respondent's dismissal from service effective July 3, 1981. Respondent then had ten days in which to appeal the decision of the investigating officer to the Superintendent of the railroad. Respondent exercised this right of appeal, but his discharge was upheld by the Superintendent on July 28, 1981. Next, Respondent had the opportunity to appeal his discharge to the Director of Labor Relations. Respondent availed himself of his right, but on September 21, 1981, his appeal was denied and his discharge was again upheld.

The terms of the collective bargaining agreement required that any further appeal be commenced within six months following the decision of the Director of Labor Relations or Respondent's claims for reinstatement and damages resulting from the discharge would be barred. No steps were taken by Respondent or anyone on his behalf, however, to perfect his appeal to the approrpiate tribunal, a

public law board operating under the auspices of the National Railroad Adjustment Board. As a result, Respondent's discharge is now final and is no longer appealable. Respondent cannot ever return to work for Petitioner in any capacity. Furthermore, it would be very difficult for Respondent to obtain employment with any other railroad in any capacity because he has a discharge for insubordination on his record.

Notwithstanding the fact that Respondent was discharged from Petitioner's employ for a matter totally unrelated to the accident or the alleged injury for which Respondent brought this FELA suit, Respondent was permitted to prove as a basis for the jury's award of damages for loss of past and future earning capacity the past wages he earned from Petitioner while working as a railroad engineer. In addition, Respondent was permitted to prove the wage rates presently in force for railroad engineers in Houston, Harris County, Texas. Absolutely no evidence was adduced by Respondent to support a recovery for loss of past or future earning potential in any capacity or job besides that of a railroad engineer—an earning potential Respondent cannot attain. Also glaringly absent from the proof on the issue of loss of earning capacity is any evidence concerning the final, unappealable discharge of Respondent and its effect on Respondent's earning capacity. Although such evidence was offered by Petitioner, the jury was not permitted to hear or consider it. The jury, instead, was led to believe that but for Respondent's injury he would be working as a railroad engineer for Petitioner today.

Petitioner also requested that the jury be instructed that in fixing the amount of damages for loss of earning capacity, no award should be based upon wages Respondent

could have received from Petitioner if Respondent had continued to be employed by Petitioner as a railroad engineer. The trial court refused to submit any such instruction to the jury. (*See* App. E) As a result, in response to special issue No. 5 (App. F), the jury awarded Respondent $56,546.00 for loss of earning capacity in the past and $180,000.00 for loss of earning capacity in the future in addition to his other damages.

Petitioner offered evidence of Respondent's discharge and its effect on his capacity to earn the wages of a railroad employee in the past and in the future, timely objected to Respondent's evidence regarding the railroad's rates of pay, and tendered properly worded jury instructions, all to no avail. Petitioner next raised its complaints regarding the exclusion of the evidence of Respondent's discharge, the admission of Respondent's evidence regarding the wages earned by railroad engineers, and the refusal to instruct the jury not to award any damages for the loss of earning capacity as a railroad engineer in points of error numbers 1, 2, and 3 in its brief in the Court of Appeals (App. G), and each of these points was overruled. In the Texas Supreme Court, Petitioner raised these contentions in points of error numbers 1, 2, and 3 in its application for writ of error (App. H) and in points of error numbers 1, 2, 3, and 4 in its motion for rehearing, but the Texas Supreme Court denied Petitioner's application for writ of error and denied Petitioner's motion for rehearing.

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted because the Court of Appeals' holding conflicts with the applicable decisions of this Court, of other state courts of last resort,

and of federal courts of appeal as to important questions of federal law arising under the FELA and the Railway Labor Act. Unless the judgments of the lower courts are reversed, this Court's and other courts' construction of the Railway Labor Act and of the FELA will be undermined by a ruling which permits the recovery of damages in this FELA case which did not result from the negligence of Petitioner and which would be recoverable only in a wrongful discharge case, if one were authorized.

This Court, in its most recent pronouncement on the scope of the FELA, stated: "It has long been settled that questions concerning the measure of damages in an FELA action are federal in character." *Norfolk and Western Railway Company v. Liepelt,* 444 U.S. 490, 493 (1980), *reh'g denied,* 445 U.S. 972 (1980). Even if an FELA action is brought in state court, therefore, this Court is the final arbitrator of the FELA and is the paramount entity responsible to create and to uphold the uniform application of that act in the federal and state courts. It is that uniform enforcement of the FELA and the Railway Labor Act, denied to Petitioner by the state courts of Texas, that Petitioner now seeks to obtain.

A cursory review of the opinion of the Texas Court of Appeals in this case reveals the utter disregard of that court for the rulings of this and other federal appellate courts. No precedent of the federal appellate courts was cited in support of the Court of Appeals' affirmation of the award of damages to Respondent under the FELA. Although Petitioner cited and quoted from authority of this Court, authority of the federal circuit courts, and the two federal statutes involved in this case in its brief, in its oral argument, and in its motion for rehearing, those citations and precedents were ignored. Instead, the Court

of Appeals relied in the main on *McIver v. Gloria,* 169 S.W.2d 710 (Tex. 1943), a case arising under Texas common law. The error in the approach taken is obvious —federal law is the law applicable to this case.

It has also long been recognized that an FELA plaintiff is entitled to recover only damages resulting in whole or in part from the negligence of the railroad. 45 U.S.C.A. § 51. If a railroad employee incurs damage for some other reason than the negligence of the railroad, he is not and never has been entitled to recover those damages in an FELA action. *See, e.g., Shupe v. New York Central System,* 339 F.2d 998 (7th Cir. 1965) (damages resulting from a second injury and not proximately caused by railroad's negligence are not recoverable), *cert. denied,* 381 U.S. 937 (1965). In the case at bar, however, the Texas Court of Appeals has ignored this statutory provision and its construction by the federal courts, and has permitted Respondent to recover earnings to which he would be entitled only if his discharge had been reversed under the appellate procedures of the Railway Labor Act.

The Railway Labor Act, in 45 U.S.C.A. § 153 First (i), requires the arbitration of discharge grievances and places the ultimate resolution of such matters in the hands of the National Railroad Adjustment Board. When Respondent failed to appeal his discharge to the Public Law Board, as required by law, his discharge for insubordination became final. The rulings of the court below that Respondent's recovery for loss of earning capacity may be based on his potential earnings as a railroad engineer, while failing to disclose to the trier of fact that Respondent can no longer obtain such employment, resulted in the recovery of damages for lost earnings and financially restored Respondent to his engineer's job as effectively

as if he had been reinstated by a public law board. In short, under the state of the evidence and the jury charge at the trial of this cause, Respondent could have recovered, and probably did recover, precisely the measure of damages he is prohibited from recovering by the Railway Labor Act and by this Court's rulings under that Act.

This Court has expressly held that the exclusive forum available to a railroad employee for the resolution of a wrongful discharge case, and for the recovery of the attendant damages, is the administrative procedure set up by the Railway Labor Act, culminating with adjudication by the National Railroad Adjustment Board or a public law board acting thereunder. *Andrews v. Louisville & N.R.R.*, 406 U.S. 320 (1972). *See also Union Pacific Railroad Co. v. Sheehan,* 439 U.S. 89 (1978), *reh'g denied,* 439 U.S. 1135 (1979). Railroad employees who believe they have been wrongfully discharged must use the exclusive remedies provided in the Railway Labot Act to be reinstated, recover back wages, regain their seniority, or recover future earnings. It is not permissible for a railroad employee to bring a private cause of action in state or federal court claiming wrongful discharge to recover past and future wages as a measure of the damages incurred. *See, e.g., Jackson v. Consolidated Rail Corporation,* 717 F.2d 1045 (7th Cir. 1983), *cert. denied,* 104 S.Ct. 1000 (1984); *Franklin v. Southern Pacific Transportation Co.,* 593 F.2d 899 (9th Cir. 1979). Although the only permissible manner in which Respondent should be entitled to receive damages measured by the loss of his wage-earning power with Petitioner would have been to appeal his discharge to the National Railroad Adjustment Board and to succeed in overturning the intial findings of insubordination, Respondent achieved the same result in this FELA case.

Perhaps the errors of the lower courts are better illustrated by the following analogy. Assume a surgeon was disabled through the negligence of another. Assume further that prior to the time the surgeon's personal injury case came to trial his license to practice medicine was revoked for the commission of malpractice unrelated to the accident which resulted in his injury. The surgeon can never again practice medicine in the state in which he had previously been licensed. Furthermore, it is very unlikely he will ever be licensed by another state. At the personal injury trial, the surgeon should not be permitted to show his earnings prior to the accident and the earnings of surgeons practicing in his geographical area after the accident in order to illustrate his loss of future earning capacity. The surgeon no longer has the earning capacity of a surgeon for reasons other than the negligence of the defendant. In addition, if proof of the surgeon's prior earnings is permitted, the defendant should be permitted to adduce the fact that the surgeon is no longer licensed to practice medicine and probably has no realistic expectation of ever practicing medicine in the future. Finally, the jury should be instructed that the surgeon's past and future earning capacity may not be measured by a surgeon's pay.

The analogy is apt. In this case, the jury was permitted only to consider that Respondent was, always had been, and always would be a railroad engineer. The truth is, as a result of his discharge for insubordination, Respondent has no realistic opportunity of obtaining a job as a railroad engineer in the future. Yet, Respondent has received an award of damages which essentially reinstates his railroad engineer wage-earning capacity. He has recovered the very lost earnings that no court may award, abrogat-

ing completely the rulings of this Court under the Railway Labor Act and resulting in the recovery of damages in this FELA case which were not caused by Petitioner's negligence, but by Respondent's own discharge for insubordination.

In addition to contradicting the writings of the Supreme Court and other federal courts of appeal which have construed the Railway Labor Act, the lower court's ruling runs counter to the decisions of federal courts of appeal and state courts of last resort which have construed the FELA. Perhaps nowhere is the conflict more evident than with the case of *Sharkey v. Penn-Central Transportation Company*, 493 F.2d 685 (2d Cir. 1974). There, an FELA plaintiff had been discharged by his railroad for his responsibility in causing the accident which resulted in his injury. The evidence of the plaintiff's discharge was admitted by the trial court, and a jury instruction was given concerning the effect of the discharge on the plaintiff's entitlement to recover for loss of earnings. The court ruled: "It seems clear that in an FELA action for damages the plaintiff is not entitled to recover for wages lost solely by reason of his discharge." *Id.* at 688. In fact, the Second Circuit Court of Appeals ruled that the instruction given by the trial court did not state forcefully enough the restriction on the jury's award for loss of earning capacity. The court found that the jury should have been explicitly instructed that the fact that the plaintiff did not return to work for the railroad was not their concern and that no damages for lost earnings were to be awarded. The *Sharkey* court thus left intact this Court's rulings on the exclusivity of the Railway Labor Act.

The logic of *Sharkey* seems clear: only those damages resulting from the negligence of Petitioner should be

recoverable by Respondent. It seems equally clear that damages resulting from the discharge of Respondent for insubordination, which discharge occurred at a time when Petitioner was not even aware that Respondent was claiming to have been injured, were not caused by Petitioner's negligence and are not recoverable in this FELA case.

A similar conclusion was reached in *Rogers v. Thompson,* 265 S.W.2d 282 (Mo. 1954), another FELA case involving a discharged employee. The Missouri Supreme Court held that evidence of the discharge offered by the defendant railroad should have been admitted because it was probative on the issue of lost earning capacity. *Id.* at 289. In addition, the court held that a requested jury instruction which would have ordered the jury not to award any amount for lost earnings which could have accrued after the date the plaintiff had been discharged should have been given. *Id.*

Respondent below sought weakly to distinguish his recovery for loss of earning capacity from the recovery which is available only under the Railway Labor Act by claiming that he sought no damages for loss of wages, but only for loss of earning capacity. Under the FELA, the following description of these damages has been used: "Earning capacity means the potential for earning money in the future, which is not necessarily based on the amount of money being earned at the time of the injury." *Taenzler v. Burlington Northern,* 608 F.2d 796 (8th Cir. 1979). It is elementary, then, that the loss of earning capacity is the loss of the potential to earn money in the future.

First, it is the loss of Respondent's potential to earn wages as a railroad engineer which must be submitted to the exclusive appellate procedures of the Railway

Labor Act for determination. Second, Respondent's proof permitted recovery only for loss of the potential to earn wages as a railroad engineer because the only evidence before the jury was evidence of Respondent's past and prospective earnings as a railroad engineer for Petitioner. Thus, the distinction urged by Respondent is merely semantical, not substantial. No evidence was presented that Respondent could earn a living in some other position. Instead, the jury was permitted to believe that Respondent was injured on April 30, 1981, that on May 1, 1981, he left work and never returned, and that he would still be working as a railroad engineer for Petitioner and would still be earning the wages capable of being earned by a railroad engineer but for his injury.

In was Respondent's burden to produce evidence of his ability to earn a living as something other than a railroad engineer. It was Respondent's burden to establish what, if any, loss of past or future earning capacity resulted from Petitioner's alleged negligence, rather than from his own insubordination. On the other hand, it was Petitioner's right to show that Respondent lacks the capacity in the future to earn a living as a railroad engineer because he was discharged for insubordination. As a result of the compound errors committed by the trial court and affirmed on appeal, Respondent is in a better position than any other employee who has ever been discharged from a railroad and who has not succeeded in overturning the discharge. He has recovered the very same measure of damages he would be permitted to recover only if his discharge were overturned. He is also in a better position than similarly situated FELA plaintiffs—he has gotten a bite at wrongful discharge damages in his FELA action and has almost certainly been awarded damages proximately

caused by his own insubordinate conduct rather than by the negligence of Petitioner.

This Court is ". . . charged with assuring the [FELA's] authority in state courts." *Brady v. Southern Railway Co.*, 320 U.S. 476, 479 (1943). Part of this Court's task in meeting this responsibility must be to undertake to reverse erroneous rulings made by state courts such as this one which conflict with this Court's rulings and undermine the ". . . uniform application throughout the country essential to effectuate [the] purposes [of the FELA]." *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359, 361 (1952). *See also Chesapeake & Ohio Railway Co. v. Kelly*, 241 U.S. 485 (1916); *Michigan Central Railroad Co. v. Vreeland*, 227 U.S. 59 (1913). The refusal of this Court to provide such review, and thus to enforce the federal authority of the FELA, has and will result in the erosion of the construction of the FELA enunciated by this Court. *Compare Missouri Pacific Railroad Co. v. Alcorn*, 598 S.W.2d 352 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref. n.r.e.), *cert. denied*, 450 U.S. 998 (1981), *with Davis v. Green*, 260 U.S. 349 (1922). *Compare Vanskike v. ACF Industries, Inc.*, 665 F.2d 188 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982), *and Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880 (8th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981), *with Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), *and Norfolk and Western Railway Company v. Liepelt*, 444 U.S. 490 (1980).

Petitioner has no recourse but to implore this Court to assume the burden with which it is charged. The opinion of the Texas Court of Appeals constitutes a blatant assault on the Railway Labor Act, the FELA, and the federal judge-made law thereunder. In fact, the errors

committed are so blatant and the impermissible effect of those errors is so obvious that this case is ripe for summary disposition on the merits. The Texas Court of Appeals' opinion illustrates that, in the absence of enforcement by this Court of its decisions in an area of federal law where this Court's authority is absolute, lower courts will ignore the pronouncements of this Court and will freely apply the law of the forum state rather than the federal law prescribed by Congress and by the Supreme Court. Unless this decision is reversed, other courts will be encouraged to award the same erroneous measure of damages in FELA cases and to ignore the exclusivity of the remedies provided by the Railway Labor Act. The Supreme Court, therefore, should grant the writ of certiorari, correct the Texas courts' rulings, and provide renewed support for the exclusivity of the appellate procedures set out by the Railway Labor Act and for the nationwide uniformity of the FELA.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted, or, alternatively, this cause should be summarily reversed on the merits.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I, Gordon A. Holloway, a member of the bar of this Court, do hereby certify that on the _____ day of February, 1985, three copies of the foregoing Petition for Writ of Certiorari were sent by certified mail, return receipt requested, to Tom R. Letbetter and George Payne, counsel of record for Respondent, at 715 Houston Club Building, Houston, Texas 77002, in compliance with Rules 19.3 and 28.5(b) of the Rules of the Supreme Court of the United States.

GORDON A. HOLLOWAY

APPENDIX A

Opinion of Court of Appeals

Court of Appeals
First Supreme Judicial District

No. 01-83-0457-CV

Affirmed, and Opinion filed March 22, 1984

Port Terminal Railroad Association, Appellant

v.

Roy W. Sims, Appellee

Appeal from the 61st District Court
of Harris County, Texas
Trial Court Cause No. 81-38723

OPINION

Roy W. Sims, Appellee, brought suit under the Federal Employers' Liability Act (hereinafter referred to as FELA), for personal injuries sustained while working for Port Terminal Railroad Association, Appellant. The accident occurred on April 30, 1981, when two railroad cars crashed into an engine where Sims was sitting, eating his lunch. The following day Sims was discharged for insubordination.

The case was tried to a jury, which returned a verdict finding Port Terminal guilty of eight acts of negligence which proximately caused the accident in question. The

jury further found that Sims was not contributorily negligent. The jury found damages of a total sum of $411,-546.00 for loss of earning capacity, past and future, physical pain and suffering, past and future, mental anguish, past and future, and physical impairment, past and future. The appeal has been duly perfected.

The Appellant contends, in its first three points of error, that the trial court erred: (1) in excluding evidence offered concerning its discharge of Sims and of Sims' subsequent failure to appeal such discharge to the National Railroad Adjustment Board; (2) in permitting Sims to offer evidence of his past earnings while employed by Port Terminal; (3) in failing to instruct the jury that in fixing the amount of lost earnings, it should not award any amount based upon what Sims would have received from Port Terminal if Sims had not been injured and had continued to be employed by Port Terminal as railroad engineer.

There is evidence that Port Terminal negligently "kicked" two railroad cars from one end of the north yard all the way to the other end of the north yard, which struck a parked locomotive engine in which Sims was seated, eating his lunch. The impact knocked Sims out of his chair and threw him into the equipment. There was evidence that Yardmaster Rogerson, who was in charge of both Sims' crew and the "kicking crew" failed to warn either crew about the presence of the other on the track. Sims finished his work that day and went home. On the next day, he had trouble walking, had pain in his lower back, and sat in an unusual position on his legs while operating the engine because of the pain in his lower back. On the same day, Sims was ordered by

Rogerson to leave his engine during his lunch break. There is evidence that when Rogerson came to the engine, Sims told him that he was the "son of a bitch" who nearly killed him the night before. The railroad subsequently charged Sims with insubordination and fired him.

There is also testimony that Sims treated himself at home with heating pads and rest for two to three weeks before the claims agent for the railroad sent him to a Dr. James Brannon for treatment of his lower back injuries. Subsequently, Sims went to Dr. Andrew Kant, with the approval of the claims agent's office. Shortly thereafter, the claims agent discovered that Sims had filed suit against Port Terminal. The claims agent then immediately notified both doctors that Port Terminal would not be responsible for their bills.

Appellant brings no point of error challenging the damage award as being excessive or not properly supported by credible evidence. While Sims was appealing his discharge under the provisions of the Collective Bargaining Agreement, this suit was filed, and no appeal was made to the National Railroad Adjustment Board. Thus, the validity of Sims' discharge became final. Appellant contends that it should have been permitted to show that as a result, Sims cannot ever return to work for Port Terminal and would have a very difficult time obtaining employment with any other railroad.

The Appellant's contention under the first three points of error is simple. Under the FELA, the plaintiff is entitled to recover for injuries "resulting in whole or in part from the negligence of [the railroad]." 45 U.S.C.A., Section 51. If the railroad employee incurs damage for some reason other than the negligence of the railroad, he is not en-

titled to a recovery under the FELA. Appellant contends that it was entitled to show the jury that the inability of Sims to earn wages equivalent to those of a railroad engineer, was not due to his alleged injury, but was instead the result of his discharge.

The nature and extent of the evidence required to establish damages resulting from lost earning capacity was considered by the Supreme Court of Texas in *McIver v. Gloria,* 169 S.W.2d 710 (Tex. 1943), a case in which the Plaintiff was engaged in farming prior to his accident, but was not actually farming during the year in which he was injured. After the injury, he was unable to do any work. The Plaintiff was an uneducated Mexican farmer whose only earnings came from manual labor. The amount of his past earnings were not shown with exactitude, the evidence merely disclosing the nature and extent of his farming operations and the kind and amount of the crops he produced.

In *McIver v. Gloria, supra,* the Supreme Court stated certain general considerations applicable to the instant case:

> In a personal injury suit, the amount which the Plaintiff might have earned in the future is always uncertain, and must be left largely to the sound judgment and discretion of the jury. However, the verdict must be based on something more than mere conjecture. It must be an intelligent judgment, based upon such facts as are available. Even where the injury is of such a serious and permanent nature, proof is required to show the extent and amount of the damages. . . . Under this rule, the required certainty of the proof will necessarily vary. Where the Plaintiff is a child, who has never earned any

> money, the jury must determine the value of its lost earning capacity altogether from their common knowledge and sense of justice. Likewise, where Plaintiff is a housewife, the actual money value of her services need not be proved. . . . On the other hand, where Plaintiff is employed at a fixed wage or salary, the amount of his previous earnings ordinarily must be shown. And where Plaintiff seeks special damages for loss of his earning capacity in a particular business or profession, the amount of his earnings or the value of his services in that business must be shown with reasonable certainty. The certainty of the proof required is also affected by the nature of Plaintiff's injuries. If Plaintiff's earning capacity is not totally destroyed, but only impaired, the extent of his loss can best be shown by comparing his actual earnings before and after his injury. (citations omitted)
>
> . . . The fact that Plaintiff was not engaged in farming at the time he was injured does not bar his recovery for loss of earning capacity, because the measure of his loss is his capacity to earn, not his actual earnings. *McIver v. Gloria, supra* at 712-713.

The essence of *McIver, supra,* is that it is not essential that the evidence show a loss of earning capacity in a particular business or profession, but only that it show a diminished earning capacity generally, that is, in any business or profession.

The damages resulting from decreased earning capacity can best be shown by evidence of what the Plaintiff was capable of earning before he was injured and what he was capable of earning afterwards, and the difference will indicate the damages he has sustained. *Southwestern Freight Line v. McConnell,* 254 S.W.2d 422 (Tex. Civ. App.—El Paso, 1942, writ ref'd).

There is evidence that Sims suffered a back injury as a result of the collision, which necessitated an operation. After the operation, Sims continued to have back pain, leg pain, stiffness and muscle spasms. His doctor recommended that he not try to do the work required of a railroad engineer, because that would cause recurrent back problems. The Federal Employers' Liability Act authorizes the courts of this state to award damages for the personal injuries suffered by a railroad employee caused by the negligence of his employer. The evidence before the jury was sufficient to support a finding that Sims was physically able to obtain and retain employment involving heavy labor prior to the accident and that after the accident, he was not able to obtain and retain employment requiring such labor. That evidence authorized the jury to find that Sims would not have been able to do the work of a railroad engineer after his injury. The fact that he was fired by the Port Terminal Railroad Association and probably could not obtain employment as a railroad engineer by reason of said discharge has no bearing on the damage suffered. The same damage would have been sustained had he not been fired. The damages result from the reduced ability to work and to obtain and retain employment. The record of his earnings prior to the date of his injury was properly admitted into evidence. See *Port Terminal Railroad Association v. Inge*, 524 S.W.2d 801 (Tex. Civ. App.—Texas [14th Dist.] 1975, no writ).

The trial court did not err in refusing to admit evidence concerning the fact that the railroad discharged Sims. This was not an issue in the case, since Sims did not seek recovery of lost wages. He prayed for lost earning capacity. The trial judge may well have feared that such

evidence would prejudice the Appellant's case. In considering the admissibility of the Plaintiff's discharge, the court in *Kelly v. New York, New Haven and Hartford Railroad Company,* 138 F. Supp. 82 (U.S.D.C., Mass. 1956) stated:

> "More fundamentally, I believe it was error to have admitted, even indirectly, over Defendant's objection, the fact that Plaintiff had been discharged, since this discharge was entirely immaterial to Plaintiff's case, and was likely to arouse prejudicial feelings."

Neither did the trial court err in failing to instruct the jury that, in fixing the amount of lost earnings, it should not award any amount based upon what Sims would have received from Port Terminal had he not been injured and had continued to be employed by the railroad as an engineer. As stated above, Sims did not seek to recover lost earnings, and was contending that he was not physically able to continue in his employment as a railroad engineer. Appellant cites *Rogers v. Thompson,* 265 S.W.2d 282 (Missouri 1984) in support of its contention that the instruction should have been given. We are unable to determine from the opinion in that case whether or not the damage issue was general and included loss of earnings as well as loss of earning capacity. In any event, the requested instruction was not in proper form, in that it speaks to loss of "earnings," which is not an issue in this case. The explanatory instruction requested was not in substantially correct form, as required by Rule 279, Tex. R. Civ. P. Appellant's first three points of error are overruled.

The Appellant contends in its fourth point of error, that the trial court erred in refusing to allow impeachment

of the Appellee regarding his safety record after the Appellee put his safety record in issue. Counsel for Appellee asked a co-employee of Sims whether Sims appeared to be a fairly safe engineer, and received an answer in the affirmative. Later on, another fellow employee testified that he had always found Sims to be a good, safe worker. Subsequently, counsel for Appellant sought to introduce, during cross-examination of Sims, the fact that he had been disciplined in the past for twice running through switches, having a collision between his engine and another engine, and running through the gates at the Diamond Shamrock plant.

The rule is well settled that when the question is whether or not a person has been negligent in doing, or failing to do, a particular act, evidence is not admissible to show that he has been guilty of similar acts of negligence. *Missouri-Kansas-Texas Railway Co. v. Johnson,* 92 Tex. 380, 48 S.W. 568 (1898); *Davis v. Snyder Industries,* 604 S.W.2d 341 (Tex. Civ. App.—Texarkana, 1980, writ ref'd n.r.e.).

The witnesses were questioned regarding their opinion as to whether Sims was a safe engineer, and not as to his general reputation in the community as a safe employee. No attempt was made to impeach the witnesses by showing that they knew of or had heard of the previous acts of negligence on the part of Sims. The trial court did not err in refusing to admit the proffered testimony. *Eichel v. New York Central Railroad Co.,* 375 U.S. 253, 84 S.Ct. 316 (1963). Appellant's fourth point of error is overruled.

Appellant's fifth point of error complains of the exclusion of certain testimony regarding payment of certain

medical expenses incurred by Sims by an insurance company. The general rule is that evidence of a collateral source of benefits is generally not admissible. *Eichel v. New York Central Railroad Co., supra.* The cases which have allowed an exception to this rule involve direct testimony by a witness inviting impeachment by such evidence. *Gladden v. P. Henderson Co.,* 385 F.2d 480 (3rd Cir. 1967) *cert. denied* 390 U.S. 1013 (1968); *Royal v. Cameron,* 382 S.W.2d 335 (Tex. Civ. App.—Tyler, 1964, writ ref'd n.r.e.).

In this case, the issue of medical expenses was not submitted to the jury because the parties had stipulated as to the amount of such expenses.

Appellee had introduced testimony that Port Terminal's claims agent had informed his doctors that they would not pay his medical expenses after August 7, 1981, because he had filed a lawsuit on that date. In response to this testimony, Appellant wished to introduce testimony that Port Terminal only pays 20% of an employee's medical benefits and that Travelers Insurance Company pays the remaining 80%. This testimony was not material to any issue in the case, and the exclusion of the testimony could not have resulted in the rendition of an improper judgment. Rule 434, Tex. R. Civ. P. Appellant's fifth point of error is overruled.

The judgment of the trial court is affirmed.

/s/ TOM L. COLEMAN, SR.
Tom L. Coleman, Sr. Chief Justice
(Retired)

Associate Justices Doyle and Cohen also sitting.

Publish.

JUDGMENT RENDERED AND OPINION
DELIVERED MARCH 22, 1984

AFFIRMED

A TRUE COPY ATTEST:

/s/ KATHRYN COX
Kathryn Cox, Clerk
FIRST COURT OF APPEALS

APPENDIX B

Judgment of Court of Appeals

No. 01-83-0457-CV

Port Terminal Railroad Association, Appellant

v.

Roy W. Sims, Appellee

Appeal from 61st District Court
of Harris County
(Tr. Ct. #81-38723)
Opinion delivered by Retired Chief Justice
Coleman, Justices Doyle and Cohen sitting.

The cause heard today by the Court is an appeal from the judgment rendered and entered by the court below on April 4, 1983. After hearing the cause on the transcript of the record and inspecting the same, it is the opinion of this Court that there was no error in the judgment. It is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed.

It is further ordered that the appellant, Port Terminal Railroad Association and its surety, St. Paul Fire & Marine Insurance Company, jointly and severally, pay all costs incurred by reason of this appeal.

It is further ordered that this decision be certified below for observance.

Judgment rendered by panel consisting of Retired Chief Justice Coleman, Associate Justices Doyle and Cohen.

THE STATE OF TEXAS *

COUNTY OF HARRIS *

I, KATHRYN COX, Clerk of the Court of Appeals, First Supreme Judicial District of Texas, at Houston, do hereby certify that the preceding 1 page contains a true and correct copy of Court's Judgment entered on March 22, 1984 in Cause No. 01-83-0457-CV Port Terminal Railroad Association v. Roy W. Sims from Harris County, and now on file in my office.

TO CERTIFY WHICH, I hereunto set my hand and affix the Seal of Said Court, at Houston, this the 28th day of January A.D., 1985.

KATHRYN COX, Clerk

/s/ CATHY CROWE

(original affixed with seal of Court of Appeals)

APPENDIX C

Order of Court of Appeals
Overruling Motion for Rehearing

Court of Appeals
First Supreme Judicial District
of Texas

Court of Appeals No. 01-83-0457-CV

Port Terminal Railroad Association, Appellant

v.

Roy W. Sims, Appellee

ORDER

On this 17th day of May, 1984 came on to be considered Appellant's Motion for Rehearing.

AND SUCH MOTION IS HEREBY OVERRULED.

PER CURIAM

Panel consisting of Justices Coleman, Doyle, Cohen.

A true copy attest:

KATHRYN COX
FIRST COURT OF APPEALS

By: /s/ MARGIE THOMPSON
Deputy

Hon. Gordon Holloway
Sewell & Riggs
800 Capital Bank Plaza
Houston, TX 77002

Hon. Tom R. Letbetter
Garrett, Letbetter & Payne
715 Houston Club Bldg.
Houston, TX 77002

THE STATE OF TEXAS *

COUNTY OF HARRIS *

I, KATHRYN COX, Clerk of the Court of Appeals, First Supreme Judicial District of Texas, at Houston, do hereby certify that the preceding 1 page contains a true and correct copy of Court's Order Of May 17, 1984 in Cause No. 01-83-0457-CV Port Terminal Railroad Association v. Roy W. Sims from Harris County, and now on file in my office.

TO CERTIFY WHICH, I hereunto set my hand and affix the Seal of Said Court, at Houston, this the 28th day of January A.D., 1985.

KATHRYN COX, Clerk

/s/ CATHY CROWE

(original affixed with seal of Court of Appeals)

APPENDIX D

Orders of the Supreme Court of Texas Refusing Application for Writ of Error and Overruling Motion for Rehearing

In the Supreme Court of Texas

No. C-3176

Port Terminal Railroad Association

v.

Roy W. Sims

From Harris County, First District

October 10, 1984

Application of petitioner for writ of error to the Court of Appeals for the First Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant pay all costs incurred on this application.

November 14, 1984

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, Mary M. Wakefield, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the order of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 29th day of January, 1985.

By: /s/ Signature Illegible, Deputy

(original affixed with seal of Supreme Court of Texas)

APPENDIX E

Excerpts from Defendant's Objections and Exceptions to the Charge of the Court and Instructions Requested by Defendant

No. 81-38723

Roy W. Sims

v.

Port Terminal Railroad Association

In the District Court of Harris County, Texas, 61st Judicial District

---

Defendant's Objections and Exceptions to the Charge of the Court

* * *

MR. HOLLOWAY: We request that these refused instructions be granted, that lost earning capacity in the future not include any amount based on what Sims would have received if he had not been injured and continued to be employed by the Defendant as a railroad engineer.

* * *

I, Charles W. Conroy, Jr., Deputy Official Court Reporter for the 61st District Court of Harris County, Texas, do hereby certify that the foregoing pages constitute a complete, true and correct Statement of Facts in the above entitled and numbered cause, which trial commenced on

the 21st day of March, A. D. 1983; that I was present at the time of said proceedings and reported same in machine shorthand; that I have caused my notes to be transcribed into typewriting under my direction and supervision.

I further certify that the exhibits which are included under separate cover are true copies of all exhibits admitted or offered, the originals having been marked by me at the time of said proceedings and kept under my care, custody and control.

I further certify that the taxable costs to the Defendant for this Statement of Facts is $3,086.50.

WITNESS MY HAND this the 8th day of August, A. D. 1983.

/s/ CHARLES W. CONROY, JR.
Charles W. Conroy, Jr.
Certified Shorthand Reporter
#780
Phone (713) 667-8385

* * *

Instructions Requested by Defendant

All requested instructions and special issues tendered by defendant/appellant (but were refused by the court). Filed: March 23, 1983. Ray Hardy, District Clerk, Harris County, Texas, by M. Wallace, Deputy.

In awarding damages, if any, for loss of earning capacity, past or future, do not include any amount based on what Roy Sims would have received if he had not been injured and had continued to be employed by Defendant as a railroad engineer.

Refused March 23, 1983

/s/ SHEARN SMITH

In awarding damages, if any, for loss of earning capacity, past or future, do not include any amount based on what Roy Sims would have received if he had continued to be employed by Defendant as a railroad engineer.

Refused March 23, 1983

/s/ SHEARN SMITH

APPENDIX F

Excerpts from Charge of the Court

No. 81-38723

Roy W. Sims

v.

Port Terminal Railroad Association

In the District Court of Harris County,
Texas, 61st Judicial District

Charge of the Court

* * *

Special Issue No. 5

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Roy Sims for his injuries, if any, which you find from a preponderance of the evidence resulted from the occurrence in question?

Answer separately in dollars and cents, if any, with respect to each of the following elements:

(A) Loss of earning capacity in the past.

Answer: _____

(B) Loss of earning capacity, which in reasonable probability, he will sustain in the future.

Answer: _____

(C) Physical pain in the past, and which in reasonable probability, he will suffer in the future.

Answer: _____

(D) Mental anguish in the past, and which in reasonable probability, he will suffer in the future.

Answer: _____

(E) Physical impairment in the past and which, in reasonable probability, he will suffer in the future.

Answer: _____

You are instructed that in answering the above issues, you will not award any sum of money by reason of the relationship of said elements to one another; so that there should be no overlapping of damage elements.

APPENDIX G

Excerpts from Brief of Appellant Port Terminal Railroad Association in Court of Appeals

No. 01-83-0457-CV

In the Court of Appeals for the
First Supreme Judicial District of Texas
Houston, Texas

Port Terminal Railroad Association, Appellant,

v.

Roy W. Sims, Appellee.

Brief for Appellant
Port Terminal Railroad Association

---

* * *

POINTS OF ERROR

Point of Error No. 1

The Trial Court erred in excluding the evidence offered by Appellant concerning Appellant's discharge of Appellee and concerning Appellee's failure to appeal such discharge to the National Railroad Adjustment Board. (S.F. 158-171, 683-696; Defendant's Bill Exhibits 5-17)

Point of Error No. 2

The Trial Court erred in permitting Appellee to offer evidence of his past earnings while employed by Appellant. (S.F. 18-20, 541-43, 682; Plaintiff's Exhibits 2, 21, and 22)

Point of Error No. 3

The Trial Court erred in failing to instruct the jury, as requested by Appellant, that the jury in fixing the amount of lost earnings should not award any amount based upon what Appellee would have received from Appellant if Appellee had not been injured and had continued to be employed by Appellant as an engineer. (Supplemental Transcript)

APPENDIX H

Excerpts from the Application for Writ of Error in the Supreme Court of Texas

No. C-3176

In the
Supreme Court of Texas

Port Terminal Railroad Association, Petitioner

v.

Roy W. Sims, Respondent

Application for Writ of Error

---

* * *

POINTS OF ERROR

Point of Error No. 1

The Court of Appeals erred in holding that the District Court did not err in excluding the evidence offered by Petitioner concerning Petitioner's discharge of Respondent concerning Respondent's failure to appeal such discharge to the National Railroad Adjudgment Board.

Point of Error No. 2

The Court of Appeals erred in holding that the District Court did not err in permitting Respondent to offer evidence of his past earnings while employed by Petitioner.

Point of Error No. 3

The Court of Appeals erred in holding that the District Court did not err in failing to instruct the jury, as requested by Petitioner, that the jury, in fixing the amount of lost earnings, should not award any amount based upon what Respondent would have received from Petitioner if Respondent had not been injured and had continued to be employed by Petitioner as an engineer.

* * *

Office - Supreme Court, U.S.
FILED
MAR 8 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1289

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

PORT TERMINAL RAILROAD ASSOCIATION,
Petitioner

v.

ROY W. SIMS,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

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Petitioner

v.

ROY W. SIMS,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

QUESTION PRESENTED

The facts and law of this case do not present the question claimed by Petitioner. Rather, the question presented is whether a Railroad can cripple an emplcyee one day, fire him the next day on the charges of the same negligent man who crippled him, and then prevent him from obtaining damages for his loss of earning capacity caused by his injuries.

LIST OF PARTIES

Petitioner — Port Terminal Railroad Association.[1]

Respondent — Roy W. Sims.

1. The Port Terminal Railroad Association is an association of railroads composed of the Missouri-Kansas-Texas Railroad Company of Texas, a corporation; Southern Pacific Transportation Company, a corporation; Burlington Northern Railway Company, a corporation; Houston Belt & Terminal Railway Company, a corporation; Missouri Pacific Railroad Company, a corporation; and the Atchison, Topeka & Santa Fe Railway Company, a corporation.

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NO. 84-1289

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

PORT TERMINAL RAILROAD ASSOCIATION,
Petitioner

v.

ROY W. SIMS,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

STATEMENT OF THE CASE

On April 30th, 1981, the Petitioner, Port Terminal Railroad Association, Yardmaster Rogerson and its employees, negligently kicked two railroad cars from one end of the north yard all the way to the other end of the north yard into a locomotive engine on which Respondent, Roy Sims, was properly eating his lunch in a stopped position. The impact was so severe that it knocked Roy out of his chair and threw him into the equipment. Yardmaster Rogerson was the yardmaster who negligently instructed Sims' crew to do what they did that evening and

negligently failed to warn Sims' crew and the kicking crew about the presence of each other on the track.

Sims told the people on the scene that he was shook up, but that he didn't think that he was seriously hurt. He finished out his work that evening. The next day Sims came back to work. He had trouble walking, had pain in his lower back, and sat in an unusual position on his legs while operating the engine because of pain in his low back.

On the day after his injury Mr. Sims was improperly ordered by the same negligent yardmaster Rogerson who had hurt him the day before to leave his engine during Sims' lunch break. When Rogerson came to the engine, Sims told Rogerson that he was the "son of a bitch" who nearly killed him the night before. The railroad claimed Sims was insubordinate and used that as an excuse to fire him. Petitioner is totally incorrect to assert that Sims was discharged "for a matter totally unrelated" to the injuries for which he sued under the F.E.L.A.

Sims went home after he was confronted by this same negligent yardmaster Rogerson and attempted to treat himself at home with heating pads and rest. After two to three weeks the Claim Agent for the railroad sent Roy to a Dr. James Brannan for treatment of his low back injuries. After he saw Dr. Brannan approximately three times, Dr. Brannan's office told Roy that the claim agent for the railroad was refusing to pay his medical bills anymore.

After being told by Dr. Brannan's office that they would no longer see Roy, he then went to a Dr. Andrew Kant about whom he had heard while working on the railroad.

In the summer of 1982, Dr. Kant told Roy to never do any type of railroad work again and to go into some other type of occupation. Since that day Roy has attempted to get jobs with security companies, oil companies, self service oil stations, car dealerships and grocery stores. He was turned down by all these people when they found out about his back injury.

Before April 30, 1981, Roy had never had any trouble sexually responding to his wife, but since his serious injuries he is unable to physically respond to her. Roy has continuous pain every day and can not handle the duties of a switchman, yardmaster, or engineer. He had worked for the Port Terminal Railroad Association as an engineer since February of 1956. Roy had been married to the same lady for over 36 years at the time of trial. He had never had any type of serious back injury or treatment for any type of back complaints in his life prior to the cars being kicked in on top of him.

Dr. Andrew Kant, a board certified orthopedic surgeon, testified that Roy's neck and back injuries were caused by the cars being kicked in on top of him; that the EMG showed a pinched nerve in the L5-S1 nerve root; and that the myelogram and CT scan showed that Roy had a herniated nucleus pulposus at the L-5, S-1 level. The myelogram also showed a small defect in his neck at the C5, C6 area. At surgery Dr. Kant found a herniated nucleus pulposus, L-5, S-1 with bilateral L5-S1 radiculopathy.

Roy continued to have back pain, leg pain, stiffness, and muscle spasms. Dr. Kant recommended to Roy not to try engineering type work and to do lighter work because engineering would cause recurrent problems with

his back. Dr. Kant stated that his physical back problems would handicap him in trying to perform the duties of an engineer and getting and keeping a job as an engineer. A weight restriction of 30 to 40 pounds on Roy's lifting for the rest of his life was placed on him by Dr. Kant. He felt that Roy has suffered physical pain, mental anguish and physical impairment in the past and will suffer pain, mental anguish and physical impairment in the future because of his back injuries. Dr. Kant felt that any type of osteoarthritis that was already in Roy's back before his injury was aggravated by the collision so as to cause him additional difficulties. Dr. Kant testified that out of ten people applying for any type of a job in Houston that Roy would have the least chance of getting that job if he was the only one with his type of serious low back surgery.

Respondent introduced testimony by Dr. Herbert Lee Brannan, the physician picked by the Railroad claim agent, by deposition. Dr. Brannan testified that Roy had a complete absence of the achilles reflex on testing, that Roy had spasm, and that this train collision aggravated the conditions in Roy's back so as to give him middle and low back problems. Dr. Brannan stated that Roy would have a handicap to some extent in going out into the competitive job market to get and keep a job with his back problems. Dr. Brannan admitted that he would not recommend that a railroad company hire a new employee like Roy with his type of back condition. Dr. Brannan admitted that out of ten people applying for a laboring job in Houston, Roy would have the least chance of getting the job out of those ten if he was the only one with the type of back surgery and back problems that he has.

Roy's wife testified that prior to April 30, 1981, Roy had lifted heavy things and done heavy work around the house, and he had a good strong back all of those years with no complaints of any type of back problems. She testified that Roy and she had a good physical relationship prior to the accident, but it had drastically changed since the accident.

Respondent sued for loss of earning capacity for personal injuries under the F.E.L.A. He sought no reinstatement to his job, no damages for "wrongful discharge", or for past loss of earnings for wrongful discharge. The Trial Court, Court of Appeals, and the Texas Supreme Court clearly understood the differences between an administrative claim because of wrongful discharge under the Railway Labor Act, and a claim for personal injuries under the F.E.L.A. The Courts below properly excluded evidence and instructions on the issue of discharge, and in so doing followed previous federal decisions distinguishing between the two causes of action. Petitioner is absolutely wrong to tell this Court that the Texas Court of Appeals "utterly disregard(ed)" federal authority because the Texas Court did cite controlling federal authority against Petitioner.

RESPONSE TO PETITIONER'S REASON FOR GRANTING THE WRIT

Petitioner is asking this Court to abrogate nearly 100 years of law under the Federal Employer's Liability Act by allowing the Railroad to cripple a man one day, then fire him the next day on the charges of the same negligent man who crippled him, and then prevent him from obtaining damages for loss of earning capacity because of his

F.E.L.A. injuries. Petitioner has requested this Court to make such an incredible, far-reaching decision even though:

a. Petitioner has never made any claim that the loss of earning capacity found in this case was excessive;

b. Petitioner did not seek a new trial because the damages found for lost earning capacity were excessive;

c. Petitioner sought no remittitur claiming that the damages for loss of earning capacity were excessive;

d. Petitioner did not claim in the Court of Appeals that Respondent's damages for loss of earning capacity were excessive;

e. Petitioner made no claim in the Court of Appeals that the failure to give its requested instruction limiting loss of earning capacity caused the rendition of an improper judgment.

Since Petitioner has never made any claim that the loss of earning capacity damage findings were excessive, its substantial rights have not been affected, and there is no basis to grant its writ. Title 28, U.S.C.A. § 2111, provides:

> "On the hearing of any appeal or writ of certiorari in any case, the Court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

The total damages found for loss of earning capacity was only $236,546.00. Damages far in excess of such sum can be found in any volume of the Federal Reporter system. *Murray v. Fairbanks Morris,* 610 F.2d 149 (3rd

Cir., 1979); *Moser v. Texas Trailor Corporation,* 623 F.2d 1006 (5th Cir., 1980); and the F.E.L.A. case of *Kansas City Southern Railway Company v. Chaffin,* 658 S.W.2d 186 (Tex. Civ. App. 1983, writ ref'd, n.r.e.) ($1,768,860 affirmed.)

Respondent tried his case on the theory that he had suffered a loss of earning capacity because of his injury. He sought no damages for *loss of wages,* or what he would have made working for Petitioner had he not been injured. Respondent pled in his trial petition for damages for loss of earning capacity because of his F.E.L.A. injuries. Respondent proved through railroad witnesses the wage rates of other railroad engineers in Harris County at times pertinent to his case. Respondent offered issues which were submitted on the loss of earning capacity, not lost wages. Whether or not Respondent lost any wages from the Petitioner was never placed in issue.

The heart of the Federal Employers' Liability Act is contained in Title 45 U.S.C.A. Section 51, which, in part, states:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, employee or employees of such carrier . . ."

In short, the Federal Employers' Liability Act provides damages for lost earning capacity personal injuries suffered by a railroad employee because of the negligence of his employer.

On the other hand, collective bargaining agreements between railroad unions and the railroad inlustry commonly provide procedures for discipline of employees. The Railway Labor Act does not allow an employee to recover FUTURE lost earning capacity.

The F.E.L.A. cause of action for personal injury damages and the administrative procedure set up under the collective bargaining agreement for wrongful discharge are mutually exclusive procedures. If the railroad's argument is accepted in this case, a railroad will be able to fire an injured worker, limit his personal injury damages which are sought because of his injury, and force him to try the contractual issues on the merits of his discharge in his personal injury action when the railroad management made the unilateral decision to fire him in the first place. An injured employee would be deprived of his right to a jury trial on his damages for loss of earning capacity if he was limited to an administrative appeal of a "wrongful discharge" case.

In the case of *Beanland v. Chicago, Rock Island and Pacific Railroad Company,* 480 Fed. 2d 109 (8th Cir. 1973), Mr. Beanland sued his railroad employer alleging an F.E.L.A. cause of action for injuries due to the negligence of the Rock Island; for wrongful discharge, alleging breach of his employment contract; and, third, conspiracy of the Rock Island and its officers in wrongfully discharging him. The Trial Court tried the cause of action under the F.E.L.A. separately. At Page 113, the Court held:

> "Damages resulting from *intentional* acts, such as the discharge, have no place in a personal injury F.E.L.A. action which deals exclusively with *negli-*

> *gence.* 45 U.S.C. § 51. In fact, an action for wrongful discharge would appropriately be in contract and not cognizable at all under 45 U.S.C. § 51."

In *Kelly v. New York, New Haven & Hartford Railroad Company,* 138 F. Supp. 82, (U.S.D.C., Mass. 1956), the Plaintiff brought a cause of action under the F.E.L.A. Plaintiff's counsel was instructed not to claim damages due to a wrongful discharge. In considering the admissibility of the Plaintiff's discharge, the Court, at page 83, stated:

> "More fundamentally, I believe it was error to have admitted, even indirectly, over Defendant's objection, the fact that Plaintiff had been discharged, since this discharge was entirely immaterial to plaintiff's case, and was likely to arouse prejudicial feelings."

Under the administrative procedures of the Railway Labor Act a railroad can have a hearing before its own officers and can unilaterally fire an employee virtually at will. Railroad management serves as the judge and jury at such hearings, and the railroad employee's only recourse is to seek to have such discipline overturned through administrative procedures. *Edwards v. St. Louis-San Francisco Railroad Company,* 361 F.2d 946 (7th Cir., 1966). These procedures can be as long and tedious as litigation, and under some circumstances, result in an appeal to a United States District Court. However, these procedures are contractual in nature and have absolutely nothing to do with personal injuries, damages for personal injuries, future lost earning capacity, or the F.E.L.A. While an employee may obtain "lost wages" depending on his time lost from work, he may also be reinstated to service with no reimbursement of lost wages, or lose his claim completely.

Petitioner is absolutely wrong on page 8 of its brief wherein it states that an employee must use the Railway Labor Act to recover "future earnings" for wrongful discharge. The board, under 45 U.S.C.A., § 153, (o) can only order recovery of back wages "on or before a day named". An employee who wins his case can only get back wages up until the day of reinstatement.

The Railway Labor Act does not provide recovery of future earnings for wrongful discharge, but only lets the employee go back to work. *Alabaugh v. The Baltimore and Ohio Railroad,* 125 F. Supp. 401 (U.S.D.C., Md. 1954) 222 F.2d 861 (4th Cir., 1955), 350 U.S. 839, 76 S.Ct. 77 (cert. denied). See also *Spade v. The Chesapeake and Ohio Railway Company,* 325 F. Supp. 1079 (1971).

Petitioner cites *Shupe v. New York Central System,* 339 F.2d 998 (7th Cir., 1965), for the proposition that a railroad employee is not entitled to recover under the F.E.L.A. for damages incurred for some other reason than the negligence of the railroad. *Shupe* was a case in which a dispute existed over the extent physical ailments complained of by Plaintiff were caused by the accident which resulted in the F.E.L.A. suit. The case had nothing to do with discharge of the employee.

The case of *Andrews v. Louisville & Nashville Railroad Company,* 406 U.S. 320, 92 S.Ct. 1562 (1972), does hold that the resolution of wrongful discharge cases involving railroad employees is an administrative procedure under the Railway Labor Act. In *Andrews,* the Plaintiff pled that he had fully recovered from an accident and was physicaly fit to return to work, but that he had been wrongfully refused employment. He sought damages for lost earnings and attorneys' fees. Whether or not Plain-

tiff in the *Andrews case* had lost any earning capacity as a result of his injury was not in issue.

Petitioner also cites *Sharkey v. Penn Central Transportation Company,* 493 F.2d 685 (2nd Cir. 1974), in which the Court stated that in an F.E.L.A. action for damages, "the Plaintiff is not entitled to recover for wages lost *solely* by reason of his discharge." (Emphasis ours) The Court stated that the principal argument raised on appeal "relates to the question of the responsibility of the defendant for the aggravation of the plaintiff's post-traumatic anxiety neurosis by reason of his discharge by the railroad". It was within this narrow context that the Court stated that an instruction should have been given "that no damages for lost earnings were to be awarded." The Plaintiff had been certified as fit to return to work prior to the time that he was advised of his potential discharge. Therefore, the Court found that there was no cause of action for lost wages other than what might have occurred as a result of his discharge. Accordingly, in finding the damages excessive, and ordering the case to be remanded for retrial, the Court in *Sharkey,* in no way, held that a discharged employee should not receive damages for loss of earning capacity as a result of an injury.

Rogers v. Thompson, 265 S.W.2d 282 (Mo. 1954), was also cited by Petitioner. This was a case in which the Plaintiff admitted fault for causing the collision which caused his injury which resulted in his discharge. Respondent Sims denied fault in causing his injuries and the jury so found.

Regardless of the legal and factual distinctions between the *Rogers* and *Sharkey* cases, and the case before

this Court, any general application of the language in the cases cited by Petitioner to personal injury F.E.L.A. causes of action would destroy the purpose of the Federal Employers' Liability Act which is to allow damages to employees negligently injured by railroad employers.

Petitioner incorrectly asserts that the Railway Labor Act is subverted by the refusal to admit evidence of Respondent's discharge. The Railway Labor Act provides administrative remedies for wrongful discharge, but in no way prevents Respondent from seeking personal injury damages for loss of earning capacity under the F.E.L.A.

Petitioner wrongfully analogizes the case at bar to the situation where a doctor is deprived of practicing medicine because of revocation of his license. A railroad employee does not have to be licensed to be a railroad worker. He may work for any railroad which would hire him. Petitioner shows the unfairness of the position it has taken in this case by stating that no railroad would hire him because Petitioner discharged him. In any event, his loss of future earnings because of wrongful discharge are not, and could not, have been an issue in an F.E.L.A. case where damages were sought for loss of earning capacity because of an injury.

Petitioner contends that Respondent recovered damages for his injury, and for his discharge as if "his discharge were overturned." Such contention is totally incorrect. Respondent recovered damages for his loss of earning capacity which was testified to by Dr. Kant, and by Dr. Brannan, the physician picked by Petitioner. The medical testimony clearly and specifically included medical limitations on Respondent to hold any job, which resulted in a general loss of earning capacity. Petitioner's position

that Respondent can recover past wages only if he prevails in a wrongful discharge case is ridiculous. If this were the law, a Railroad could unilaterally dispose of F.E.L.A. claims by discharging an injured employee for insubordination the day after they hurt him.

Petitioner unfairly states that the Court of Appeals relied on *McIver v. Gloria,* 169 S.W.2d 710 (Tex. 1943) instead of Federal law. Petitioner had claimed in the Court of Appeals, *but not in this Court,* that Respondent should not have been able to prove his past earnings for Petitioner. The Court of Appeals simply pointed out that *McIver's* holding was to the effect that past wages are evidence of lost earning capacity.

In *McIver, supra,* the evidence showed a diminished earning capacity generally, that is, in any business or profession. Respondent's proof was likewise directed to loss of earning capacity.

Nowhere at any stage of the trial, motion for new trial, appeal of this case to the Court of Appeals, or application for writ of error to the Texas Supreme Court, or before this Honorable Court, has Petitioner, in any way contended that the damages for loss of earning capacity found by the Jury were improper or excessive. If Petitioner could not even contend that the damages were excessive, when all of its complaints of error deal with damage issues, it has no basis to claim that an improper judgment was entered in this cause, nor that the Court of Appeals erred in affirming the judgment of the Trial Court.

CONCLUSION

The merits of the discharge of a railroad employee have no place in a personal injury negligence action under the F.E.L.A. Otherwise, a railroad could simply discharge an injured employee and limit his recovery for future earning capacity by proving its unilateral discharge of its employee. Respondent sought no loss of wages because of his discharge in this case, but rather sought loss of earning capacity because of an injury inflicted by the negligence of his employer under the F.E.L.A. A railroad employee's past wages is the most proper and efficient way to prove lost earning capacity.

Respondent never based any of his recovery upon what he would have made had he remained an employee of Petitioner. Accordingly, the Trial Court was absolutely correct in not giving an instruction to the jury that Respondent could not recover from Petitioner for loss of earning capacity based on what he would have received from Petitioner had he not been injured.

Petitioner never claimed that the damages for loss of earning capacity were excessive in this case.

The jury heard the evidence, found appropriate damages, and not even the Petitioner claimed that the damages are excessive.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that Petitioner's Petition for Writ of Certiorari be refused and the judgment of the Court of Appeals and the Trial Court be in all things affirmed.

Respectfully submitted,

GARRETT, LETBETTER & PAYNE

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Response to Petitioner's Application for Writ of Error has been forwarded to Mr. Gordon A. Holloway, Mr. Kyle M. Rowley, and Ms. Teresa W. Folger, SEWELL & RIGGS, 800 Capital Bank Plaza, Houston, Texas 77002 on this 27th day of March, 1985, in accordance with the Rules of the United States Supreme Court.

Tom R. Letbetter

TOM R. LETBETTER

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NO. 84-1289

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

PORT TERMINAL RAILROAD ASSOCIATION,
Petitioner

v.

ROY W. SIMS,
Respondent

REPLY BRIEF OF PETITIONER

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I

LIST OF PARTIES

Petitioner—Port Terminal Railroad Association.[1]

Respondent—Roy W. Sims.

1. The Port Terminal Railroad Association is an association of railroads composed of the Missouri-Kansas-Texas Railroad Company of Texas, a corporation; Southern Pacific Transportation Company, a corporation; Burlington Northern Railway Company, a corporation; Houston Belt & Terminal Railway Company, a corporation; Missouri Pacific Railroad Company, a corporation; and the Atchison, Topeka & Santa Fe Railway Company, a corporation.

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ROY W. SIMS,
Respondent

REPLY BRIEF OF PETITIONER

To The Supreme Court Of The United States:

ARGUMENT AND AUTHORITIES

A. Respondent's Discharge and the FELA.

Respondent, in his Brief in Opposition, has attempted to maintain two contradictory positions on his discharge by Petitioner. First, Respondent implies that his discharge was in retaliation for his injury claim. At the same time, however, Respondent alleges that the discharge was totally irrelevant to the present claim. The very question presented, as reformulated by Respondent, of "whether a railroad can cripple an employee one

day, [and] fire him the next day on charges of the same negligent man who crippled him, . . ." (Brief p. I) demonstrates that Respondent views this issue as a wrongful discharge claim.

If Respondent's discharge was wrongful, however, the proper remedy under the Railway Labor Act was a direct appeal of the discharge itself. Having foregone his right to appeal, his discharge is valid and final. Respondent may not now use his FELA claim to recover damages based upon an alleged wrongful discharge.

Respondent also argues that the writ should be refused in this case to deter wrongful discharges, since the discharge could limit FELA damages. One major flaw in this analysis is that while such a discharge may result in a smaller recovery under the FELA, it would subject the Railroad to damages for wrongful discharge under the Railway Labor Act. The Railroad's net position would not be improved by the discharge.

Respondent's position on the discharge requires this Court to assume that (1) the Railway Labor Act itself does not remedy and thereby deter wrongful discharges; (2) that the proper purpose of an FELA action is to remedy and prevent discharge of employees; and (3) that the decisions of the Texas courts would act as an effective deterrent and remedy for a discharged employee. Respondent has offered neither facts nor logic to support these assumptions.

It is especially ironic that Respondent should both seek to punish Petitioner for the alleged wrongful discharge and deter it from making such discharges in the future, when Petitioner has shown that at the time Respondent was fired no claim for injury had been made.

Respondent did not report his injury until seventeen days after his discharge. Not only did Petitioner have no incentive to discharge Respondent because of an unknown injury claim, but Respondent had a motive for filing a retaliatory injury suit because he was discharged. The rulings of the Texas courts thereby appear to encourage employees to retaliate against a railroad that has validly discharged them, by filing an FELA suit seeking to recover the loss of earnings that could not be recovered under the Railway Labor Act because the discharge would be upheld. This result undermines the procedures mandated by the Railway Labor Act in favor of state common law remedies.

B. Basis of the Texas Court's Opinion.

Respondent contends that it is unfair to state that the Texas Court of Appeals relied upon state, rather than federal law, in deciding the issues on the effect of the discharge in this FELA suit. A detailed examination of the opinion of the Court of Appeals, (Appendix A to the Petition for Writ of Certiorari), reveals a total lack of other authority for its holding. The Court prefaced its discussion of this issue with the statement that "[t]he nature and extent of the evidence required to establish damages resulting from lost earning capacity was considered by the Supreme Court of Texas in *McIver v. Gloria,* 169 S.W.2d 710 (Tex. 1943), ..." This and other state court cases discussed by the Court of Appeals set forth the usual rule, that it is normally proper to consider a Plaintiff's occupation, effect of the injury thereon, physical ability to perform his work at the time of injury and thereafter, and his earnings before and after the accident. The cases previously cited

by Respondent establish, however, that in an FELA case additional facts could restrict a plaintiff's prior earnings as a basis for recovery. *Rogers v. Thompson,* 265 S.W.2d 282 (Mo. 1954); *Sharkey v. Penn Central Transportation Co.,* 493 F.2d 685 (2nd Cir. 1974). Nowhere in the Texas Court of Appeals' opinion is there any authority, state or federal, that under the circumstances of this case Petitioner could not introduce Respondent's discharge as evidence of the cause of his loss of earning capacity. The only federal case cited by the Court of Appeals was *Kelly v. New York, New Haven and Hartford Railroad Co.,* 138 F. Supp. 82 (D.C. Mass. 1956), which held that it was error to admit evidence of discharge over the defendant's objection. This is obviously no authority for a refusal to admit evidence offered by the defendant.

Likewise, the two federal cases cited by Respondent in support of the opinion below, merely hold that evidence of discharge cannot be used *by the plaintiff* to bolster his recovery in an FELA case. Thus, for example, in *Beanland v. Chicago, Rock Island and Pacific Railroad Co.,* 480 F.2d 109 (8th Cir. 1973) the Court refused to admit evidence of discharge, even though the plaintiff contended it was relevant on the issue of mental anguish. The Court's holding was to the same effect in *Kelly v. New York, New Haven and Hartford Railroad Co.,* 138 F. Supp. 82 (D.C. Mass. 1956). In both of these cases the Defendants opposed admission of the evidence, which the courts viewed as potentially prejudicial to the Railroads. Respondent, however, has offered no authority that a Defendant cannot prove the discharge when, as in this case, it is relevant on the issue of earning capacity.

In the trial court, Respondent claimed decreased earning capacity because of his inability to work, allegedly as a result of his injury. His only evidence of past and future wages was in the railroad industry. Finally, Respondent informed the jury that he was injured on April 30, 1981, left work on May 1, and never returned to work as a railroad engineer, implying that this was solely because of his injuries.

The jury was not told of the real reason for Respondent leaving work early on May 1, namely his discharge for insubordination. Neither was the jury informed that after May 1, Respondent was not entitled to work for Petitioner as a result of his discharge and would have been unlikely to obtain other similar employment as a result of having a discharge for insubordination on his record. The jury was misled into believing that Respondent left his shift early on May 1, and never returned, solely because he was in such pain and was so injured that he could not continue to work. This result occurred because the Texas courts ignored federal and other decisions on damages in an FELA case cited by Petitioner and relied upon Texas common law. The net result of the Texas courts' opinions in this case will be an undermining of the administrative process established by the Railway Labor Act, which this Court has held to be the exclusive arbiter of claims for wrongful discharge. The state courts will thereby be encouraged to substitute state law measures of damages and ignore contrary federal authority in FELA cases.

CONCLUSION

For the foregoing reasons, the Petition For Writ of Certiorari should be granted, or, alternatively, this cause should be summarily reversed on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gordon A. Holloway, a member of the bar of this Court, do hereby certify that on the _____ day of April, 1985, three copies of the foregoing brief were sent by certified mail, return receipt requested, to Tom R. Letbetter and George Payne, counsel of record for Respondent, at 715 Houston Club Building, Houston, Texas 77002, in compliance with Rules 19.3 and 28.5(b) of the Rules of the Supreme Court of the United States.

GORDON A. HOLLOWAY